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IN THE
COURT OF APPEALS OF INDIANA

TOBY D. JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A05-0509-CR-515
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT 2
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0402-MR-01

August 24, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

After pleading guilty to Murder[1] and Confinement While Armed with a Deadly Weapon, a Class B felony,[2] Appellant, Toby Johnson, was sentenced to an aggregate term of eighty years imprisonment. Upon appeal, Johnson challenges his sentence in several respects.

We reverse and remand with instructions.

The record reveals[3] that on January 26, 2004, at approximately 11:30 p.m., Johnson went to the back door of a home located near his apartment and demanded to see Jeramie Stewart. Johnson engaged in a verbal confrontation with Stewart's mother before Stewart went outside to confront Johnson. Stewart took a crowbar from Johnson and then threw him to the ground and continued to hit and kick Johnson several times. Stewart's mother eventually stepped between Stewart and Johnson and stopped the fight. Stewart's brother, Thomas, and Dawn Maxwell, Johnson's niece, helped Johnson to his feet, and Thomas gave the crowbar back to Johnson. Dawn then walked Johnson toward his apartment, which he shared with Sue Briscoe. At around midnight, Dawn parted from Johnson at the gate outside his apartment.[4]

At approximately 12:30 a.m. on January 27, Johnson went to a nearby liquor store and called his mother collect from a pay phone. Johnson informed his mother that

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[1] Ind. Code § 35-42-1-1 (Burns Code Ed. Repl. 2004).

[2] Ind. Code § 35-42-3-3 (Burns Code Ed. Repl. 2004).

[3] At the guilty plea hearing, the parties stipulated to the probable cause affidavit as the factual basis for Johnson's guilty plea. The facts as set out herein are taken from the probable cause affidavit.

[4] Dawn returned about an hour later out of concern for Johnson because "he had been very intoxicated" when she left him. Appendix at 17. In addition to Dawn, Stewart and Thomas also observed that Johnson appeared to be intoxicated.

Briscoe was not breathing and that he did not know what to do. Johnson's parents told him numerous times to call 911, but because they were unsure if Johnson called 911, at approximately 1:00 a.m. Johnson's step-father called 911 to report an unresponsive female at Johnson's apartment located at 216 South 5th Street, Apartment 5.

Several officers of the Lafayette Police Department were dispatched to that location and, upon arriving, found Johnson lying outside on the snow-covered ground shaking. Johnson's clothes and shoes were blood soaked and the ground around him was covered in blood. Johnson was breathing and moaning but was incoherent. The officers then noticed that the storm door to Apartment 5 was shattered, but that the door to the apartment was locked. Beneath the door, the officers found a set of keys and a crowbar covered with blood. The officers used the keys to gain entry into the apartment, where upon entering they observed a deceased female, later identified as Briscoe, sitting on the couch. As the officers continued moving through the apartment, they noticed signs of a struggle, including blood stains all over the apartment floor and walls, turned over furniture, and broken glass. In the kitchen, the officers found a large amount of blood as well as a broken baseball bat. In the bathroom, the officers observed a broken mirror and additional blood and blood splatter on the floor and about the walls.

Johnson was transported to the hospital where he acted belligerent and hostile toward the nursing staff and the police. An examination revealed that Johnson had sustained a large scratch on his left upper bicep, a swollen right elbow, as well as several scratches on his right side, two scratches on his upper back, and a three-inch cut on the ball of his foot. Upon his release from the hospital, Johnson was interviewed by the

police and informed them that he had no recollection of the events of the night of January 26 and into the early morning hours of January 27.

Forensic analysis of blood samples showed that Johnson's clothes contained the blood of both Johnson and Briscoe and that blood found on the kitchen floor likewise contained a mixture of blood from both Johnson and Briscoe. Blood taken from the curved end of the crowbar contained the blood of Briscoe, while the flat side of the crowbar contained a mixture of Johnson and Briscoe's blood. Additionally, one end of the baseball bat contained Briscoe's blood, while the other end contained a mixture of Johnson's and Briscoe's blood. Bloodstain flight patterns indicated that the initial injuries were sustained in the kitchen and that the altercation then moved down the hallway into the bathroom. The bloodstain flight patterns further indicated that the victim then tried to escape into a bedroom but was somehow prevented from doing so. There was also evidence that the victim attempted to escape out the front door, but was again prevented from leaving. The victim's blood was splattered on the wall behind the couch where her body was found, indicating that she was struck one or more times at that location. An autopsy report shows that Briscoe died of multiple blunt force trauma to the head, face, and scalp and that she suffered injuries on her hands and arms consistent with defensive wounds.

On February 18, 2004, the State charged Johnson with Count I, murder; Count II, criminal confinement resulting in serious bodily injury, a Class B felony; Count III, confinement while armed with a deadly weapon, a Class B felony; Count IV, aggravated battery, a Class B felony; Count V, battery, a Class C felony; Count VI, battery

committed by means of a deadly weapon, a Class C felony; Count VII, battery as a Class A misdemeanor; and Count VIII, intimidation while armed with a deadly weapon, a Class C felony. On November 5, 2004, the State filed an habitual offender allegation. On June 6, 2005, Johnson, pursuant to a plea agreement, pleaded guilty to Count I, murder, and Count III, confinement while armed with a deadly weapon, and the State agreed to dismiss the remaining counts and the habitual offender allegation. Under the terms of the plea agreement, sentencing was left to the trial court's discretion.[5]

On July 15, 2005, the trial court held a sentencing hearing. In sentencing Johnson, the trial court identified as aggravating factors that Johnson has a lengthy criminal history, the risk that Johnson would re-offend, the brutal nature and circumstances of the crime, that Johnson took advantage of the victim over a long period of time, and that the victim was of limited ability to defend herself. The trial court found as mitigating factors that Johnson pleaded guilty, thereby saving the State the cost of trial and sparing the victim's family the trauma of trial, and that he accepted responsibility for the crime.[6] The trial court, finding that the aggravators outweighed the mitigators, sentenced Johnson to the maximum term of sixty-five years for murder[7] and an enhanced sentence of fifteen years for the B felony confinement.[8] The trial court ordered the sentences served consecutively for a total aggregate sentence of eighty years imprisonment.

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[5] The plea agreement further provided that Johnson waived his Blakely rights by consenting to judicial fact-finding with regard to aggravating and mitigating factors.

[6] The sentencing court's reference to Johnson's remorse was in the context of his guilty plea and was not referenced as a separate mitigator.

[7] Ind. Code § 35-50-2-3 (Burns Code Ed. Repl. 2004).

[8] Ind. Code § 35-50-2-5 (Burns Code Ed. Repl. 2004).

Upon appeal, Johnson claims that the trial court afforded insufficient mitigating weight to the mitigator identified and failed to consider his level of intoxication as a mitigating factor. Johnson also argues that the court could not order his sentences to be served consecutively. Finally, Johnson argues that his sentence is inappropriate given the nature of his offense and his character. We address each argument in turn.

Johnson first argues that the trial court failed to afford significant mitigating weight to the fact that he pleaded guilty. It is well-settled that a trial court is not obligated to weigh or credit a mitigating factor as the defendant suggests. Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied. Further, the fact that a defendant pleaded guilty does not automatically amount to a significant mitigating factor. Id. Where the defendant has received a substantial benefit or where the evidence against him is such that the decision to plead guilty is a pragmatic one, the fact that a defendant pleaded guilty does not rise to the level of significant mitigation. Id.

Here, the trial court found as mitigating that Johnson had pleaded guilty and further noted that such was not "inconsiderable." Transcript at 43. The court noted that by pleading guilty, Johnson saved the State the time and money of going to trial and spared the family of the victim the trauma of trial. Nevertheless, it is clear that Johnson received a substantial benefit by pleading guilty. To be sure, the State dismissed four felony charges, one misdemeanor charge, and an habitual offender allegation which could have served to enhance Johnson's sentence by thirty years. Given these circumstances, we cannot say that the trial court should have afforded more mitigating weight to the fact that Johnson pleaded guilty and accepted responsibility.

Johnson also claims that the trial court failed to find his intoxication at the time of the offenses to be a mitigating factor. The finding of mitigating factors is a matter within the sound discretion of the trial court. Ankney v. State, 825 N.E.2d 965, 973 (Ind. Ct. App. 2005), trans. denied. Only when a trial court fails to find a mitigator which the record clearly supports does a reasonable belief arise that the mitigator was improperly overlooked. Georgopulos v. State, 735 N.E.2d 1138, 1145 (Ind. 2000). With regard to voluntary intoxication, the trial court is not obligated to view such as a mitigating factor. Lemos v. State, 746 N.E.2d 972, 976 (Ind. 2001).

Here, the trial court had evidence before it of Johnson's level of intoxication on the night of the offenses and acknowledged such during its sentencing statement. However, rather than afford such mitigating weight, the court found that such increased the significance of Johnson's criminal history. The trial court noted that Johnson had a history of alcohol-related and substance abuse offenses and further noted that such showed that when Johnson was intoxicated he had a tendency to get violent and was unable to control his behavior.[9] Based upon the foregoing, we cannot say that the trial court overlooked the evidence of Johnson's intoxication as a mitigating factor. It is clear that the court considered Johnson's voluntary intoxication, but sufficiently explained that it simply did not find it to be a significant mitigator.

Johnson also claims that the trial court's imposition of consecutive sentences violates his "rights against double jeopardy." Appellant's Brief at 13. Specifically,

[9] Johnson's criminal history shows numerous criminal transgressions involving alcohol or substance abuse and/or disorderly conduct or resisting law enforcement.

Johnson argues that the confinement charge to which he pleaded guilty required no more than was necessary to accomplish the murder. Thus, Johnson maintains that the confinement and the murder were not separate and distinct acts thereby limiting the court's discretion to impose consecutive sentences. We agree with the State, however, that Johnson has waived his right to challenge his convictions[10] and resulting sentences by pleading guilty.[11]

In Games v. State, 743 N.E.2d 1132, 1135 (Ind. 2001), our Supreme Court held that defendants who plead guilty to achieve favorable outcomes in the process of bargaining give up a plethora of substantive claims and procedural rights. Among these is the right to challenge his conviction and sentence upon double jeopardy grounds. Id.; see also Mapp v. State, 770 N.E.2d 332 (Ind. 2002) (holding that defendant waived right to challenge convictions upon double jeopardy grounds when he entered into plea agreement). Here, Johnson received substantial benefits in exchange for his guilty plea to murder and confinement while armed with a deadly weapon. To be sure, the State agreed to dismiss four felony charges, one misdemeanor charge, and a possible thirty-year habitual offender sentence enhancement. Johnson, whom we note was represented by

[10] Johnson frames his argument as a sentencing error. Indeed, only sentencing challenges are available upon direct appeal following a guilty plea. See Tumulty v. State, 666 N.E.2d 394, 395-96 (Ind. 2002).

[11] As noted above, the plea agreement provided that sentencing was within the discretion of the trial court.

counsel, bargained to his own benefit. In so doing, he waived his right to challenge his sentence upon double jeopardy grounds.[12]

Finally, Johnson argues that his sentence is inappropriate. Indiana Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we conclude] that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

Here, as to the nature of the offense, we agree with the trial court that the offenses to which Johnson pleaded guilty were "among the most brutal crimes . . . ." Transcript at 43. The condition of the apartment and the blood splatter and stains throughout indicate that this was a brutal attack that took place throughout the entire apartment. The autopsy report details the extensive injuries to the victim's head, face and scalp, specifically noting numerous large lacerations, some of which had extensive protruding brain matter, fragments of the skull bone, which in areas had penetrated brain matter, and numerous fractures to facial bones. Crime scene photos reveal that the victim was virtually unrecognizable. Notwithstanding the brutality of the crime, we hold that a total aggregate sentence of eighty years is inappropriate in light of the character of the offender.[13] The evidence reflecting upon Johnson's character shows that Johnson has a

[12] Even if we were to consider the merits of Johnson's claim, Johnson's claim would fail. The evidence does not support Johnson's claim that the confinement was no greater than necessary to accomplish the murder. The evidence showed that the attack on the victim occurred over a period of time and throughout the entire apartment. There was evidence that the victim tried to escape from Johnson on two separate occasions but was unable to get away. The final blows which resulted in the victim's death were separate and distinct from the confinement which the victim suffered at the hands of Johnson.

[13] In this vein, we note that we are not taking issue with the trial court's imposition of the maximum sentence for murder and an enhanced sentence for B felony confinement. In concluding that

substance abuse problem and has a tendency to become belligerent when intoxicated. His criminal history is comprised of numerous offenses for alcohol-related, non-violent crimes. Further, although Johnson could not remember what transpired during the early morning hours of that January day, he chose to plead guilty to murder and B felony criminal confinement in order to spare the victim's family the trauma of trial. Such leads us to conclude that an aggregate eighty-year sentence is inappropriate. Rather than remand to the trial court for re-sentencing, we choose to exercise our authority to revise the sentence. We therefore remand to the trial court with instructions to order the sentences served concurrently, thereby providing for a total aggregate term of sixty-five years imprisonment.

The judgment of the trial court is reversed and remanded with instructions.

KIRSCH, C.J., and DARDEN, J., concur.

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the sentence is inappropriate, we are not disagreeing with the trial court's assessment that the aggravators outweighed the mitigators.